UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

RLI INSURANCE COMPANY,

Plaintiff,

vs.

FIFTH THIRD BANCORP,

Defendant.

Case No. 1:14-cv-00802

Judge Timothy Black
Magistrate Judge Stephanie K. Bowman

FIFTH THIRD BANCORP et. al.,

Plaintiffs,

vs.

CERTAIN UNDERWRITERS AT LLOYD'S SUBSCRIBING TO POLICY NUMBERS B0509QA04810, B0509QA051310, 81906760, *et al.*,

Defendants.

Case No. 1:14-cv-869

Judge Timothy Black
Magistrate Judge Stephanie K. Bowman

FIFTH THIRD'S OBJECTIONS TO THE MAGISTRATE JUDGE'S MEMORANDUM AND ORDER COMPELLING THE PRODUCTION OF ATTORNEY-CLIENT PRIVILEGED ADVICE, ANALYSIS AND MENTAL IMPRESSIONS (DOC NO. 134)

Plaintiffs Fifth Third Bancorp and Fifth Third Bank (collectively, "Fifth Third") respectfully submit these Objections to the Magistrate Judge's May 9, 2017 Memorandum Opinion and Order (the "Order") compelling Fifth Third to produce documents and testimony reflecting attorney-client privileged legal advice, analysis and mental impressions in these commercial breach of contract and declaratory judgment actions.

I. INTRODUCTION

On May 9, 2017, the Magistrate Judge entered the Order to resolve several of the parties' disputes as to the scope of Fifth Third's attorney-client privilege in these consolidated insurance coverage cases. Fifth Third's insurance carriers had argued that Fifth Third waived any attorney-client privilege, with both its in-house and external counsel, simply by pursuing the insurance coverage under the fidelity insurance bonds (collectively the "Bond") sold to it by the insurers. No Ohio court has ever before adopted that position. Moreover, the Ohio Supreme Court in *Jackson v. Greger*, 110 Ohio. St. 3d 488, 854 N.E.2d 487 (2006), expressly rejected the "at issue" waiver doctrine that formed the basis of the insurers' waiver of privilege arguments.

The Order adopted, in part, the insurers' position and ordered Fifth Third to produce documents and testimony that normally would be protected from disclosure by the attorney-client privilege. The Order reached this conclusion by creating a new exception to the attorney-client privilege never previously recognized by any Ohio court: the Rule of Necessity Exception. This exception appears to mirror the "at issue doctrine" that *Jackson* expressly rejected. Creation of this exception is further inconsistent with *Jackson's* admonition that courts may not create new categories of waiver or exception to the attorney-client privilege in light of the Ohio legislature's codification of that privilege. The Order deviates from Ohio law by holding that *Jackson's* no-implicit waiver holding applies only to testimony and not to the production of documents, when *Jackson* itself was decided in the context of a written discovery dispute. Given the fundamental sanctity of the cornerstone attorney-client privilege and the broad implications of the Order's adoption of a waiver rule based on necessity, Fifth Third respectfully objects to the foregoing portions of the Order in order to preserve and uphold the protections of attorney-client privilege afforded to it under Ohio law.

II. LEGAL STANDARD

The Magistrate Judge's legal conclusions are reviewed *de novo*. *See Gandee v. Glaser*, 785 F. Supp. 684, 684 (S.D. Ohio 1992). Whether the attorney-client privilege applies is a mixed question of law and fact. *See Ross v. City of Memphis*, 423 F.3d 596, 600 (6th Cir. 2005). In this Circuit, however, questions of waiver of attorney-client privilege are considered questions of law that qualify for *de novo* review. *E.g.*, In re Grand Jury Proceedings, 78 F.3d 251, 253-54 (6th Cir. 1996). This Court in reviewing the Magistrate Judge's determination must modify or set aside any part of the Order that is clearly erroneous or contrary to law. *See* Fed. R. Civ. P. 72(a).

III. REQUESTED STAY

In light of the significant attorney-client privilege issues presented by the Order and the fact that Fifth Third would be unable to preserve the privilege if it were required to comply with the Order, Fifth Third respectfully requests that this Court stay operation of the Order pending the resolution of Fifth Third's Objections.

IV. BACKGROUND

In these consolidated insurance coverage actions, Fifth Third seeks to recover approximately $100 million from its fidelity insurance carriers due to losses caused by the dishonest and/or fraudulent acts of Fifth Third's former employee, Matthew Ross ("Ross"). Ross caused Fifth Third to approve a $100 million lending facility, LIPF II, for InsCap, a lending customer that Ross brought to Fifth Third. Ross failed to disclose to Fifth Third, however, his prior personal and business dealings with InsCap's principal, Ed Netherland, and his improper financial transactions with Netherland while acting on Fifth Third's behalf. Ross further hid InsCap's fraudulent activities, participated in those activities and misrepresented both the nature of InsCap's fraud and his involvement in that fraud once it was finally uncovered. Fifth Third did not discover Ross' participation in the InsCap fraud until January of 2011 after it hired an outside investigator to investigate Ross' conduct in connection with the LIPF II Program.

The insurers' primary defense to Fifth Third's insurance claim is that they can avoid paying for Fifth Third's substantial losses based on select information Fifth Third allegedly knew before the Bond's coverage period of July 1, 2010 to July 1, 2011. Specifically, the insurers seek to disclaim coverage under the following Bond language:

> This bond applies only to loss first discovered by the Chief Risk Officer, Office of Risk Management, Office of General Counsel, Internal Audit, Loan Review or any Executive Officer of the first named Insured during the Bond Period. Discovery occurs at the earlier of the Chief Risk Officer, Office of Risk Management, Office of General Counsel, Internal Audit, Loan Review or any Executive Officer of the first named Insured being aware of:
>
> a. facts which a reasonable person would expect to result in a loss of the type covered by this bond;
> or
>
> b. an actual or potential claim in which it is alleged that the Assured is liable to a third party.
>
> Regardless of when the act or acts causing or contributing to such loss occurred, even though the amount of loss does not exceed the applicable Deductible Amount, or the exact details of loss may not then be known.

It is beyond dispute that the "first named Insured" under the Bond is "Fifth Third Bancorp" ***not*** Fifth Third Bank. This "discovery" language in the Bond expressly was changed from using the general word "Insured" to use the specific phrase "first named Insured" in order to provide broader coverage to Fifth Third under the Bond. It is further beyond dispute that Fifth Third Bancorp (unlike Fifth Third Bank) had only Executive Officers in 2010-2011; it did ***not*** have any Offices of Risk Management, General Counsel, Internal Audit or Loan Review. Accordingly, for purposes of the Bond's discovery provision, it is only the knowledge of Fifth Third Bancorp's Executive Officers, a limited number of senior executives, that can constitute "discovery" and would be relevant to the coverage determination.[1] One of Fifth Third Bancorp's Executive Officers during the 2010-2011 Bond Period was also the Chief Legal Officer and an in-house attorney for Fifth Third Bank.

Over the course of the three years these actions have been pending, Fifth Third produced nearly a million pages of documents relating to information known about Ross, including extensive documentation relating to both an internal and external investigation into Ross' conduct. Fifth Third provided hundreds of documents to the insurers in support of its claim even before litigation was commenced. Fifth Third produced over 800,000 pages of documents in connection with these actions. Over the past two years, the insurers have deposed twenty current and former Fifth Third employees, consultants and experts. In fact, the investigator Fifth Third hired in 2011, James Rechel, was deposed twice in these actions. In addition, the insurers were supplied dozens of transcripts of depositions of Fifth Third's former and current employees and consultants whose depositions were taken in connection with Illinois litigation relating to the LIPF II Program (the "Illinois Action"), including additional depositions of Mr. Rechel.

Despite the extensive discovery provided to the insurers in these actions, the Underwriters filed on March 31, 2017 a motion to compel the production of *all* documents appearing on Fifth Third's privilege log regardless of relevance or privilege. At the pre-motion conference relating to Underwriters' motion, Fifth Third requested entry of an order pursuant to Federal Rule of Evidence 502(d) that would allow Fifth Third to produce any factual information the insurers deemed relevant to the action without waiving the attorney-client privilege with respect to this or any other litigation.[2]

---

[1] Underwriters want to interpret the Bond's discovery provision as including any employee that worked in four separate departments of ***Fifth Third Bank***, rather than abiding by the bargained-for language limiting the discovery provision's application to the Executive Officers of ***Fifth Third Bancorp***. Underwriters' desired interpretation would sweep thousands of employees into the Bond's discovery provision, including many employees with ministerial positions who would have had absolutely no knowledge or appreciation of the Bond or Fifth Third's reporting requirements pursuant to the Bond. Underwriters' contrary interpretation is erroneous and unreasonable.

After the parties negotiated language designed to target any factual information that might be relevant to the insurance claim, the Magistrate Judge entered the parties' stipulated Rule 502(d) Order. *See* Rule 502(d) Order (Doc. No. 117). Under that order, Fifth Third produced approximately 500 additional documents (either redacted or in full) containing facts concerning: (i) the actual or alleged activities of Ross; (ii) any actual or alleged fraud or misconduct relating to the LIPF II Program; or (iii) any actual or potential claim in which it is alleged Fifth Third is liable to a third party in connection with Ross, the LIPF II Program, Concord Capital Management, LLC (f/k/a Inscap Management LLC), or the Clean-Up Loans. After the Rule 502(d) production, the only material still withheld on the basis of the attorney-client privilege that could conceivably bear on the issues in this action would be attorney-client legal advice that was separate and apart from any factual information relating to the categories set forth in the Rule 502(d) Order.

In their motion to compel, Underwriters argued that Fifth Third had waived all attorney-client privilege under the "at issue" doctrine simply by pursuing insurance coverage under the Bond it purchased from Underwriters. *See* Underwriters' Memorandum (Doc No. 116). Citing to a single Illinois case, the premise of which has been rejected by at least one Ohio court as "laughable,"[3] Underwriters asserted the Bond's standard "cooperation clause" requires Fifth Third to share all attorney-client privileged information with Underwriters in this litigation, which presumably would have resulted in a waiver in the Illinois Action as well. Underwriters failed to advise the Magistrate Judge that the Ohio Supreme Court in *Jackson* expressly rejected the "at issue" waiver doctrine and that Ohio courts similarly have rejected the Illinois privilege theories upon which Underwriters arguments were premised. *See* Underwriters' Memorandum (Doc. No. 116).

---

[2] Federal Rule of Evidence 502(d) provides that "A federal court may order that privileged or protection is not waived by disclosure connected with the litigation pending before the court – in which event the disclosure is also not a waiver in any other federal or state proceeding."

[3] *See Owens-Corning Fiberglass Corp. v. Allstate Ins. Co.*, 660 N.E.2d 765, 769 (Ohio Ct. Com. Pl. 1993)(rejecting using cooperation clause of policy as basis for stripping insured of privilege as was done in *Waste Management, Inc. v. Int'l Surplus Lines Ins. Co.,* 579 N.E.2d 322 (Ill. 1991)

Fifth Third filed an opposition to Underwriters' motion as well as a motion for a protective order relating to the depositions of certain of Fifth Third's attorneys. In its opposition, Fifth Third pointed out that Ohio does not recognize implied waiver and that Underwriters already have all of the factual information they seek through the extensive prior, non-privileged discovery as well as the Rule 502(d) production. *See* Fifth Third's Opposition (Doc No. 121). Fifth Third further sought to extend the Rule 502(d) Order to the anticipated testimony of its attorneys by requesting a ruling that its attorneys could testify as to the facts they knew about Ross and when they learned those facts without waiving the attorney-client privilege. *Id.* Because legal advice is not at issue in the litigation, Fifth Third further sought a ruling that the attorney-witnesses would not be required to divulge protected attorney-client communications, legal advice or analysis. *Id.*; *see also* Fifth Third's Motion for Protective Order (Doc No. 122).

On an expedited basis, the Magistrate Judge issued a lengthy opinion tackling several difficult discovery issues presented in this complex litigation. The Order granted in part and denied in part Underwriters' motion to compel and denied Fifth Third's motion for a protective order While the Order correctly disposed of several of the discovery issues presented, Fifth Third believes the Order's holding stripping its protection over attorney-client privileged materials, including the mental impressions and legal advice of its attorneys, is clearly erroneous and contrary to the law.

Essentially, the Order departs from settled Ohio law by creating a new exception to the attorney-client privilege that has never been recognized by any Ohio court. Specifically, the Order creates a "Rule of Necessity" exception as a proxy for the "at issue doctrine" that *Jackson* rejected. The Order further deviates from *Jackson* by limiting *Jackson's* holding to only testimony, and not to the production of documents, when *Jackson* itself was decided in the context of requests for the production of documents. Given the broad implications of the Order and the critical nature of the attorney-client privilege, Fifth Third respectfully objects to the Order's disposition of this issue in order to preserve and uphold the privilege protections afforded to it under Ohio law.

V. OBJECTIONS

A. Controlling Ohio Law On The Attorney-Client Privilege.

Ohio courts have repeatedly recognized the attorney-client privilege as "one of the oldest recognized privileges for confidential communications." *Squire Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St. 3d 161, 937 N.E.2d 533 (2010). As noted by the Ohio Supreme Court, the laudable and well-settled purpose of the attorney-client privilege is:

> [T]o encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy depends on the lawyers being fully informed by the client. By protecting client communications designed to obtain legal advice or assistance, the client will be more candid and will disclose all relevant information to his attorney, even potentially damaging and embarrassing facts.

Id. at 165 (internal citations and quotations omitted). The attorney-client privilege applies "(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence, (5) by the client, (6) are at his insistence permanently protected, (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived." *Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, No. 26634, 2013 WL 4153540 at *2 (Ct. App. Ohio Aug. 14, 2013).

In Ohio, the attorney-client privilege is governed by statute and, in cases that are not addressed by statute, by common law. *See* R.C. 2317.02(A). Section 2317.02(A) establishes a testimonial privilege that not only prohibits testimony at trial, but also protects sought-after communications during the discovery process. *See Squire Sanders*, 127 Ohio St. 3d at 165. In relevant part, Section 2317.02(A) provides:

> The following persons shall not testify in certain respects:
>
> (A)(1) An attorney, concerning a communication made to the attorney by a client in that relation or concerning the attorney's advice to a client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client. However, if the client voluntarily reveals the substance of attorney-client communications in a nonprivileged context or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject. R.C. 2317.02(A).

In *Jackson*, the Ohio Supreme Court held that R.C. 2317.02(A) provides the exclusive means by which privileged communications between an attorney and a client may be waived. *See Jackson*, 110 Ohio St. 3d 488, 854 N.E.2d 487. There, the parties had suggested to the Ohio high court that attorney-client privilege may be implicitly waived under the "at issue" doctrine set forth in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). *Id.* at 489-90. Under *Hearn*, the privilege is waived if: (1) a party asserts the privilege through an affirmative act, such as filing suit; (2) through this affirmative act, the party puts the protected information at issue by making it relevant to the case; and (3) applying the privilege would deny the opposing party access to information vital to the defense. *Hearn*, 68 F.R.D. at 581.

The *Jackson* Court rejected *Hearn's* doctrine of implied waiver by refusing to apply any judicially created waivers or exceptions in addition to those expressly created in the attorney-client privilege statute. In so holding, the Court noted that, because the General Assembly chose in the statute to limit the means by which a client might waive the privilege, "it is not the role of this court to supplant the legislature by amending that choice." *Id.* at 491. Accordingly, under Ohio law, an insured cannot and does not waive the attorney-client privilege by either purchasing an insurance policy or bringing suit to recover insurance policy proceeds to which it is entitled. *Accord Waite, Schneider, Bayless & Chesley LPA v. Davis*, No. 1:11cv00851, 2013 WL 4757486, at *4 (S.D. Ohio July 12, 2013) (noting that, post-*Jackson*, Ohio "no longer recognizes the common law doctrine of implied waiver."). Instead, the sole means to waive the attorney-client privilege is through affirmative testimony, by the client or with the client's consent, as mandated by the General Assembly in the language of R.C. 2317.02.

Apart from waiver, Ohio law historically recognized certain exceptions to the attorney-client privilege prior to enactment of the statute. Specifically, Ohio courts have recognized the following four exceptions to the attorney-client privilege: (1) the crime-fraud exception; (2) the lack-of-good faith (*Boone*) exception; (3) the joint-representation (common interest) exception; and (4) the self-protection exception. *See Squires*, 937 N.E.2d at 538-544. In *Squires*, the Ohio Supreme Court was careful to explain that these exceptions are separate and distinct from the concept of waiver and survive *Jackson's* rejection of the implicit waiver doctrine. *Id.* at 543 (explaining that *Jackson* "dealt with only a ***waiver*** of the attorney-client privilege" where *Squire* addresses "a common-law ***exception*** to the privilege . . . ." – two distinct issues); *see also Dinsmore & Shohl LLP v. Gray*, No. 1:14-cv-900, 2016 WL 7852522 at *6 (S.D. Ohio Jan. 5, 2016) (explaining that waiver involves a client's known relinquishment of the privilege after it has attached whereas an exception exists if the privilege never attached to the communication as a matter of public policy).

None of these exceptions apply to this action. The crime-fraud exception applies where an attorney cooperates with a client in committing wrongdoing. *Id.* at 538-39. There is no such assertion here. The lack-of-good faith (*Boone*) exception applies solely to an insurer's claim files where there is an allegation the insurer acted in bad faith in denying an insurance claim. This exception was created due to the perceived "abuse" of the attorney-client relationship where an insurer uses its attorneys to act in bad faith. *Id.* at 539-540. Here, discovery is sought from the insurance policyholder, not the insurer, in a breach of contract action – there is no allegation that Fifth Third failed to act in good faith. *Accord* Order at 13 n. 14 (noting that this is not a *Boone* situation). The joint-representation exception is inapposite – Fifth Third and its insurers were never represented by the same counsel. *Id.* at 540.[4] Finally, the self-protection exception, which allows an attorney to defend himself in a legal malpractice action, has no application here. *Id.* at 541.

B. The Order's Erroneous Departure From Ohio Law In Creating And Applying A Necessity Exception To The Attorney-Client Privilege.

While the Magistrate Judge appears to have recognized that none of Ohio's exceptions to the attorney-client privilege apply to this action, she nevertheless applied a "Rule of Necessity" exception to the attorney-client privilege that mirrors the "at issue" doctrine rejected by *Jackson*. The "rule of necessity" language adopted by the Magistrate Judge appears to have been borrowed largely from dicta in *Waite, Schneider, Bayless & Chesley Co. L.P.A.*, Case No. 1:11C00851, 2013 U.S. Dist. LEXIS 123936 (S.D. Ohio July 12, 2013). In *Waite*, the court allowed the discovery of attorney-client communications in a fee collection action where the

[4] Ohio courts expressly have rejected application of the common interest doctrine in highly contested insurance coverage actions. *See, e.g., Buckeye Corrugated, Inc. v. Cincinnati Ins. Co.*, No. 26634, 2013 WL 4153540 (Ct. App. Ohio Aug. 14, 2013); *see also Owens-Corning Fiberglas Corp. v. Allstate Ins. Co.*, 74 Ohio Misc.2d 174, 660 N.E.2d 765 (Ct. Com. Pl. Ohio, Lucas Cty. 1993) (finding application of the common interest doctrine to an insurer and an insured involved in contentious insurance coverage litigation to be "somewhat laughable").

defendant asserted a counterclaim for legal malpractice. The court found that the otherwise privileged material fell within the self-protection exception to Ohio's attorney-client privilege, because the plaintiff needed the information to defend against the legal malpractice counterclaim.

The *Waite* Court expressly acknowledged that, post-*Jackson*, Ohio "no longer recognizes the common law doctrine of implied waiver." *Id.* at *13. Consistent with *Squires*, however, the *Waite* Court applied one of Ohio's traditional exceptions to the attorney-client privilege – the self-protection exception. In the course of so doing, the court noted that Ohio's traditional exceptions to the attorney-client privilege generally fall within a "rule of necessity" – *i.e.* they were born of the concern that a party would be unable to prove his claim or defense in the absence of the exception. *Id.* at *15 (quoting *TattleTale Alarm System, Inc. v. Calfee halter & Griswold, LLP*, 2011 U.S.Dist. LEXIS 10412, 2011 WL 38267, *5 (S.D. Ohio)). The court acknowledged that it must abide by Ohio's rejection of the implied waiver doctrine, but discussed several pre-*Jackson* "at issue" cases because the policies underlying the "at issue" doctrine "are the same as those underlying the self-protection exception to the privilege." *Id.* at * 22. At no time, however, did the court recognize or hold that Ohio has a separate "Rule of Necessity" exception to the attorney-client privilege, a holding that would run afoul of *Jackson's* admonition that the courts are not at liberty to create such an exception in light of the General Assembly's enactment of R.C. 2317.02.

By contrast, the Order created a new "Rule of Necessity" exception to the attorney-client privilege that has never been recognized by any Ohio court. This exception would resurrect the "at issue doctrine" the Ohio Supreme Court expressly rejected in *Jackson* and contravene *Jackson's* holding that waiver of the privilege is governed exclusively by statute. Under the

Order, privileged information that is relevant to a claim or defense in the action loses its privileged protection under the broad parameters of a Rule of Necessity. Information protected by the attorney-client privilege, however, does not lose that protection simply because it might be "relevant" to a claim or defense in subsequent litigation. *See, e.g., Dinsmore*, 2016 WL 7852522 at *8 ("relevance alone is not enough to invade the privilege"); *Avis Rent A Car System, LLC, et. al. v. City of Dayton, Ohio*, No. 3:12-cv-399, 2013 WL 3778922 (S.D. Ohio 2013) (quashing subpoena for attorney testimony where testimony was held to be relevant but privileged); *see also* Fed. R. Civ.P. 26(b)(1) (allowing discovery of solely "***non-privileged*** matter that is relevant to any party's claim or defense . . . .") (emphasis added). To hold otherwise effectively would eviscerate the attorney-client privilege, because the dialogue between an attorney and client will almost always be relevant to the subject matter of the litigation. This result would fly in the face of centuries of settled law protecting the sanctity of attorney-client communications, advice and mental impressions and impose a chilling effect on consultation between attorney and client that the privilege is designed to protect and foster.

Application of the Order's Rule of Necessity exception to this action illustrates its sweeping and improper reach. Here, Fifth Third has never asserted or relied upon the advice of its counsel in presenting its insurance claim. The Bond language ties discovery to "facts" and "allegations"-- there is no mention in the Bond of legal advice or attorney-client privileged material. While the Bond includes some attorneys as "discovering agents," there is no indication or requirement that attorney advice is necessary to establish an insurance claim.[5] The

[5] This is not to say that an attorney who is a discovery agent could not testify as to certain subjective conclusions or lay "mental impressions" of factual circumstances. Attorneys' mental impressions are protected to the extent that they involve a legal analysis. An attorney, however, could testify as to subjective lay conclusions he reached based on known facts. Accordingly, even without any waiver, an attorney could be asked his opinion as to whether, based on the factual information known to that lawyer, he believed that Ross engaged in dishonest conduct. Fifth Third is seeking solely to preserve attorney-client privileged advice, analysis and legal mental impressions, none of which are "at issue" with respect to Fifth Third's claim for insurance proceeds under the Bond.

Court is required to interpret the language of the Bond based on undisputed facts as a matter of law – a lawyer's legal interpretation of the Bond's language (right or wrong) is not required to establish an insurance claim. *See generally Construction Contracts Employer Group, LLC v. Federal Ins. Co.*, 829 F.3d 449, 453 (6th Cir. 2016) (the interpretation of an insurance contract is a question of law for a court to answer). There accordingly is no basis to conclude that Fifth Third has "placed at issue" its attorneys' advice. *Accord Dinsmore*, 2016 WL 7852522 at *10 (party did not place at issue attorney-client communications when she did not testify that she relied on attorney advice and did not reveal the substance of any attorney advice).

In fact, Underwriters go so far as to argue that, because the knowledge of even non-attorneys might be informed by legal advice, an insured waives all attorney-client privileges by seeking insurance coverage under a fidelity bond with any type of discovery language. *See* Underwriters' Reply (Doc No. 127) at 5-6. If this were the standard, virtually every litigant could argue that their opponent waived the attorney-client privilege in any case where a witness' knowledge is relevant to a claim or defense. Take for example a standard breach of contract claim. Suppose a client contacts an attorney for advice regarding whether the client risks being in material breach of a contract by refusing to pay the contract price where the goods he received were defective. Suppose further the client is later sued for breach of contract, but does not invoke advice of counsel to defend against the action. No court would hold that the client waived the attorney-client privilege simply by contending that he has not breached the contract, irrespective of any attorney advice. The same is true here. Under the Rule of Necessity adopted in the Order, however, this natural conclusion would not follow.

Perhaps more fundamentally, this is simply not a case where the Underwriters are unable to prove their defense absent the attorney-client privileged advice they seek. Here, Fifth Third has produced reams of documentation and pages of deponent testimony on what it knew about Ross' conduct over time. It produced witness statements, company investigative files and evidence gathered in support of its insurance claim relating to Ross' dishonesty and fraud. The insurers extensively deposed twenty Fifth Third witnesses, including Fifth Third's outside investigator, on what Fifth Third knew about Ross' conduct and when it had that information. Fifth Third further produced portions of 500 documents off its privilege log (including documents that were shared with or authored by attorneys) that contained factual information relating to Ross' conduct and/or allegations of Ross' conduct pursuant to the Rule 502(d) Order.

Underwriters have not pointed to any "attorney-advice" that would add anything additional to the wealth of information they already have as to what Fifth Third knew about Ross' conduct and when it knew it. The privileged documents cited in the Order are illustrative. The first is a five page memo from Susan Clayton, an employee in the Bank Protection department, to Marc Brandt and in-house attorney. *See* Order at 14. Fifth Third initially produced only a portion of the memo containing some factual background. The rest was redacted because Ms. Clayton was seeking legal advice from Mr. Brandt relating to her factual investigation of Ross. The redacted information, however, was identical to a similar write-up done by Ms. Clayton that Fifth Third previously produced in full to the insurers. Once the Court entered the Rule 502(d) Order, Fifth Third produced the entire memo. The formerly redacted portion added absolutely nothing new to the case, because the same factual information was produced from Ms. Clayton's investigative file.

The second document is a memo from Fifth Third's outside counsel, Michael Gill, summarizing a meeting with Columbus Nova's lawyers on May 11, 2010 that Fifth Third produced pursuant to the Rule 502(d) Order. *See* Order at 18, n. 15. This meeting was attended by non-lawyers at Fifth Third and Columbus Nova, many of whom have been deposed in these actions and/or the Illinois Action. Here again, Underwriters can make no showing that any privileged attorney-client advice, analysis or legal impressions is either necessary to defend against Fifth Third's insurance claim or that the facts relating to what Fifth Third knew about Ross could not be obtained through non-privileged sources. *See generally Dinsmore*, 2016 WL 7852522 at *7-8 (sustaining objections to Magistrate Judge's order requiring the production of privileged information where there was no showing that the documents were vital to the defense or contained indispensable information unavailable by any other means); *Shumaker, Loop & Kendrick, LLP v. Zaremba*, 403 B.R. 480, 484 (N.D. Ohio 2009) (once a *prima facie* case of privilege is established, the party challenging the privilege has the burden to establish that the material is discoverable under an exception or waiver).

Interpretation of the Bond's discovery provision is within the province of the Court based upon the undisputed facts. *See Construction*, 829 F.3d at 453 (6th Cir. 2016). Underwriters have been fully provided with all relevant facts regarding what Fifth Third knew about Ross and when it knew it. Attorney-client privileged advice is simply not at issue or necessary to this action and should not be ordered to be produced under a "Rule of Necessity" exception to the privilege, the at issue waiver doctrine, or otherwise.

C. The Order's Error In Failing To Apply *Jackson* To Documents As Well As Testimony.

In addition to creating and applying a never-before-recognized exception to Ohio's attorney-client privilege, the Order further parts company with *Jackson* by holding that *Jackson's* rejection of the implied waiver doctrine applies solely to attorney testimony and not to documents. The Order does so by examining cases where a clear exception to the attorney-client privilege, such as the *Boone* exception, applied. *See, e.g., In re Professional Direct Ins.*

Co., 578 F.3d 432, 441 n. 6 (6th Cir. 2009) (analyzing issue in context of *Boone* exception to attorney-client privilege and noting that "*Jackson* was a privilege waiver case . . . [i]t did not involve the common law exception . . . established in *Boone* . . . ."); *The William Powell Co. v. National Indemn. Co.*, Case No. 1:14-cv-00807, 2017 U.S. Dist. Lexis 55148, at * 63 (S.D. Ohio April 11, 2017) (holding that the testimonial privilege "in bad faith insurance cases" does not apply to documents in light of *Boone*).[6] As set forth in *Squires*, however, *Jackson* does not apply where there is an established exception to the attorney-client privilege. Exception cases thus are inapposite to whether *Jackson's* no-implied waiver ruling applies to both testimony and documents. Based on *Jackson* itself, it clearly does.

Jackson resolved the implied waiver question in the context of a request for the production of documents and answers to interrogatories, not a request for an attorney to testify. *Jackson*, 854 N.E.2d at 493. The majority held that there was no implied waiver applicable to this privileged information.[7] *Id.* at 489 n.1 ("A testimonial privilege applies not only to prohibit testimony at trial, but also to protect the sought-after communications during the discovery process."). *Waite* similarly applied *Jackson's* no-implied-waiver rule in the context of a request for both documents and testimony. *Waite*, 2013 U.S. Dist. LEXIS 123936 at *13; *see also Stepka v. McCormack*, 66 N.E.3d 32, 40 (Ohio Ct. App. 2016) (rejecting argument that attorney's file was at issue and thus discoverable because *Jackson* provides the exclusive means of waiving attorney-client privilege); *Ware v. Miami Valley Hosp.*, 604 N.E.2d 791, 794 (Ohio Ct. App. 1992) (hospital incident report constituted privileged attorney-client communications protected from disclosure pursuant to R.C. 2317.02). Based on this binding Ohio law, *Jackson*'s no-implicit-waiver holding applies to both documents and testimony. Any contrary ruling in an action where there is no established exception would be both impractical and unworkable as a party could obtain otherwise privileged documentary evidence but would be unable to question witnesses about that evidence.

---

[6] In addition to being inapposite given application of the *Boone* exception, this ruling in *Powell* is currently subject to objections pending before the district court.

[7] Only one justice, who concurred in the judgment rendered in *Jackson*, distinguished between testimony and documents – the *Jackson* majority opinion did not. This single concurrence, of course, is not the holding the Court and therefore not governing law. In fact, that concurrence was rejected by a majority of the *Jackson* Court.

D. In the Alternative, the Rule 502(d) Order Should Be Extended To Cover Any Attorney Advice and Testimony.

Should this Court disagree with Fifth Third and find that attorney-client privileged advice, legal analysis or mental impressions should be produced in this action, Fifth Third would respectfully request that, at a minimum, this Court extend the existing Rule 502(d) Order to cover this material as well in order to preserve Fifth Third's attorney-client privilege *vis-à-vis* any third parties to this litigation. While Fifth Third strongly believes that Ohio law does not recognize a waiver of the attorney-client privilege where an insured is simply seeking to obtain the insurance coverage to which it is entitled and is not affirmatively invoking advice of counsel, at a minimum, Ohio insureds should be protected from a waiver of the privilege in any companion cases where a third party is seeking to hold the insured liable. Ohio insureds should not be required to choose between: (1) protecting the attorney-client privilege in a liability action against it and foregoing its contractual insurance coverage rights; or (2) waiving that privilege in the liability action in order to secure the insurance coverage to which it is entitled. If this Court concludes the challenged portion of the Order should stand, it should allow Fifth Third to produce documents and attorney testimony pursuant to the Rule 502(d) Order to avoid this untenable Hobson's choice.

VI. CONCLUSION

For the foregoing reasons, Fifth Third respectfully requests that the Court sustain Fifth Third's objections to the Magistrate Judge's Order, grant Fifth Third's Motion for Protective Order and deny Underwriters' Motion to Compel.

RESPECTFULLY SUBMITTED,

/S/ Mark J. Byrne

Mark J. Byrne (0029243)
Kenneth F. Seibel (0025168)
JACOBS, KLEINMAN, SEIBEL & MCNALLY, LPA
30 Garfield Place, Suite 905
Cincinnati, OH 45202
Email: mbyrne@jksmlaw.com
kseibel@jksmlaw.com

David Halbreich (Pro Hac Vice)
Traci Rea (Pro Hac Vice)
Douglas Widin (Pro Hac Vice)
REED SMITH LLP
355 South Grand Avenue, Suite 2900
Los Angeles, CA 90071
Email: dhalbreich@reedsmith.com
trea@reedsmith.com
dwidin@reedsmith.com

Charles E. Turnbull (Pro Hac Vice)
Marc D. Kaszubski (Pro Hac Vice)
Lawrence M. Scott (Pro Hac Vice)
O'REILLY RANCILIO P.C.
12900 Hall Road, Suite 350
Sterling Heights, MI 48313
Emails: cturnbull@orlaw.com
mkaszubski@orlaw.com
lscott@orlaw.com

Attorneys for Fifth Third Bancorp and Fifth Third Bank

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2017, I served a copy of the foregoing Objections to the Magistrate Judge's Opinion and Order Compelling the Production of Attorney-Client Privileged Advice, Analysis and Mental Impressions (Doc No. 134) via electronic mail using the Court's electronic filing system to the following:

Attorneys for Certain Underwriters at Lloyd's Subscribing to Policy Numbers B0509QA048710, B0509QA051310, and 81906760 and AXIS Insurance Company

John W. Blancett
Christopher J. Losquadro
Christopher C. Novak
Sedgwick LLP
Brookfield Place
225 Liberty Street, 28th Floor
New York, NY 10281
Email: john.blancett@sedgwicklaw.com
christopher.losquadro@sedgwicklaw.com
christopher.novak@sedgwicklaw.com

David P. Kamp
Brian D. Goldwasser
Jean Geoppinger McCoy
White, Getgey & Meyer Co., L.P.A.
One West Fourth Street, Suite 1700
Cincinnati, OH 45202
Email: dkamp@wgmlpa.com
bgoldwasser@wgmlpa.com
jmccoy@wgmlpa.com

Attorneys for Continental Insurance Company; Fidelity and Deposit Insurance Company; St. Paul Mercury Insurance Company

Luke J. Busam
Frost Brown Todd
301 East Fourth Street
Great American Tower, Suite 3300
Cincinnati, OH 45202
Email: lbusam@fbtlaw.com

Julia Blackwell Gelinas
Bryan S Strawbridge
Frost Brown Todd
201 N. Illinois Street, Suite 1900
Indianapolis, IN 46204
Email: jgelinas@fbtlaw.com
bstrawbridge@fbtlaw.com

Attorneys for RLI Insurance Company

Robert W Hojnoski
Carrie Masters Starts
Nathan A. Lennon
Reminger Co., L.P.A.
525 Vine Street , Suite 1700
Cincinnati, OH 45202
Email: rhojnoski@reminger.com
cstarts@reminger.com
nlennon@reminger.com

Scott L. Schmookler
Regina A. Ripley
Ji-Yeon Suh
Gordon Rees Scully Mansukhani, LLP
One North Franklin, Ste. 800
Chicago, IL 60606
Email: sschmookler@gordonrees.com
rripley@gordonrees.com
jsuh@gordonrees.com

/S/ Mark J. Byrne
Attorney for Fifth Third Bancorp